

Viewed from Without

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Teaching constitutional law qualifies for the highest offices of the state – that is an almost unquestioned fact in Germany. In recent German history, this profession has spawned two Federal Presidents, two Federal Ministers of the Interior, two Federal Ministers of Justice, one Federal Minister of Defence and one Shadow Federal Minister of Finance, not to mention the state level. That seems quite natural to most: For someone who reflects on the legal basis of state action for a living, being in charge of state action appears like basically turning theory into practice.

Party offices, however, is a different matter. To become the federal chairman of a party was not a preferred path to political responsibility for legal academics. So far, that is. Now, Matthias Herdegen, professor of public law at the University of Bonn for some 28 years, has proclaimed his readiness to take over the chair of Germany's still largest and long-time governing party CDU from the incumbent, Chancellor Angela Merkel – a breath-takingly ambitious jump from the musty seminar rooms of Bonn right to the pinnacle of power, with no political experience whatsoever and nothing but his publication list as a token of qualification. This is new, and it will be interesting to watch how far he will get, as that might teach us a lot about the state of the country and even more about that of constitutional jurisprudence.

Herdegen has published an op-ed in the FAZ this week in which he describes how he wants to breathe new life into the CDU as a *Volkspartei*, a party of and for the whole German people: Angela Merkel's "situational moderating political style" and the "sudden loss of state control over the German borders" had maneuvered the CDU into a sandwich position between the far-right AfD and its "professionally stirred fears of a disintegration of state authority and a division of society" on the one hand, and the Greens with their "longings for a healthy world and a moral self-image" on the other. Instead of this, Herdegen wants to develop a "coherent overall package" from "guiding principles of the legally constituted community and the individual", containing things like controlled immigration and tax cuts and *Bundeswehr* missions and a European Union the use of which consists mostly in preventing the Italians from dumping their fiscal burden on the "German citizen".

None of this is original. Herdegen's vision is basically that everything will be fine and as it used to be, hardly unusual for a conservative. But, I wonder, why would the CDU need a constitutional law professor for this?

It was a bunch of constitutional law professors who marked the refugee crisis in 2015/16 as an emergency of the rule of law. They created the myth of the "rule of lawlessness" that Horst Seehofer and the AfD so gratefully took up later. They delegitimised the Dublin system and claimed a legal obligation for Germany to close its borders. They contrasted the allegedly failed European refugee law system to a vision of something compact and complete, round, intact, whole, "derived from the

guiding principles of the legally constituted community and the individual". Matthias Herdegen was, as far as I can see, silent at that time. Now he speaks.

This shining, round, wholesome, perfect thing is what Herdegen claims to offer, and I wouldn't be surprised if he will find quite a number of takers at the CDU party conference. It's a highly attractive product for many in these unhomely times. What the buyers should consider, however: whether something is round, compact and complete can only be seen from the outside. To draw this picture, you have to step out of it. You have to take a point outside of what you see in order to see the whole. That is the reason why the experts for law, state, and order like so much to talk about emergency, catastrophe, and war.

15 years ago, Herdegen had already been in the public spotlight, involuntarily though. Ernst-Wolfgang Böckenförde had sounded alarm in the FAZ about Herdegen's commentary on Article 1 of the *Grundgesetz* in that multi-volume whopper of constitutional erudition called "Maunz/Dürig", the most renowned commentary on the German constitution and still a tool many lawyers find indispensable to find out what the law is. "Human dignity is inviolable", is what Article 1 famously proclaims, and up until 2003 it was taken as a matter of course that this norm, the linchpin of the entire constitutional order, is exempt from balancing with other competing rights and state interests. Not so Herdegen. That was a shock. He seemed to suggest that inhumanity might in fact be conceivable under the Basic Law in certain constellations, that the point outside of the law could and should be internalized. What followed was a whole wave of post-9/11 "think the unthinkable" constitutional fever fantasies, from citizen sacrifice to rescue torture, most of which is remembered but in embarrassment today.

Herdegen's offer, as tempting as it looks, is an empty shell. The order in which we live is not compact, round and whole, it has never been and never will be. We mortal beings will never get a glimpse at the whole of the legal order, only the lowly internal perspective in which we meet all sorts of wild, frightening, inapprehensible things all the time. Suddenly, 100,000 Syrians show up at the Rosenheim train station and apply for asylum. What do we do? We try to find out who they are and who is competent to handle their claims, and that takes time, and the Greeks don't cooperate, and at the end the transfer period has expired and we are responsible for those fellows ourselves. Well, thank you very much. But that is what the Dublin system does: making sure that someone, at the end, is responsible. Is that round? Is it compact? Is that a "coherent overall package"? Of course not. But it is the order that we have. And to work with it and honor it and improve it where it is politically possible and obey it where it isn't, instead of stepping out of it and seeking to replace it with something whole and perfect – that is what conservatives do, right?

As opposed to, say, the AfD.

The crisis continues

Now to Poland: There, after the CJEU's injunction, most of the forcibly retired judges of the Supreme Court have returned to work at the request of their

President Ma#gorzata Gersdorf. From their own point of view and that of most lawyers in Poland, they had never effectively retired anyway, and this view runs parallel to the Luxembourg order to restore exactly the situation of 2 April 2018 at the court with regard to the composition of the bench, competences and working conditions.

With the order, the CJEU has entered uncharted territory, and the immense risk it took became immediately apparent. The Polish government interprets the order quite differently from the Supreme Court. From the government's point of view, the order only means that it is itself that is now called upon to implement it, and no-one else – and before it has done so, the returning judges remain just cranky old retirees incompetent to adjudicate. What the government seems to have in mind to placate the CJEU is to have the retired judges be newly nominated by the National Judicial Council and newly appointed by President Duda – which, as a desirable side-effect, should also restore some of the PiS-subservient National Judicial Council's legitimacy. For the time being, however, the ousted Supreme Court judges have, from the government's point of view, no business to show up at the Court at all.

For the time being, the crisis has not been resolved at all – on the contrary: it is entering a new phase. In legal terms, this also raises interesting questions as to the direct effect of the CJEU's temporary injunctions, an instrument which has only rarely been used to date: Does the order apply directly or does it have to be implemented? The former is supported by the fact that Article 19 TEU, the infringement of which is at stake, applies directly itself, too. The second may be supported by the fact that the order must not anticipate the decision in the main action. In the end, the CJEU will have the opportunity to clarify this in its decision on the merits of the case. Until then, the crisis will continue.

My thanks go to Ulrich Karpenstein, Walther Michl and Patryk Wachowiec for immensely valuable input!

Collision course

DANIEL SARMIENTO looks with a worried frown at the revolution initiated by the CJEU's order: "Nothing appears to be stopping the Court from playing hardball in this new chapter of European integration, in which 'integration through law' has now turned, to the surprise and concern of us all, into 'integration through the rule of law'".

STANISLAW BIERNAT, former Vice-President of the Polish Constitutional Court, and MONIKA KAWCZY#SKA analyze the move of the **Polish** Prosecutor General and Minister of Justice to have referrals by Polish courts to the CJEU in matters of judicial organisation declared unconstitutional by the Constitutional Tribunal.

A head-on collision is also what the EU Commission and the **Italian** government are racing towards at the moment. For the first time, the Commission has rejected a draft budget plan from a member state as a violation of EU law, and violating EU law was exactly what the Italian government had intended to do in the first place. What is a Union supposed to do with a member state that deliberately breaks the

law and, when confronted, takes a thuggish sue-me position? That question calls for an urgent answer in Italy as well as in Poland. PAUL DERMINE explains the legal background.

Slovakia is rarely mentioned in terms of illiberal democracy nowadays. But what the Slovak parliament has done this week with regard to the appointment of judges to the constitutional court, does not give rise to much hope at all, as MAX STEUER reports.

In **Hungary**, the Fidesz government plans once again to change the electoral law for the upcoming European elections and also grant Hungarians outside the EU the right to vote. Normal procedure or manipulation? VIKTOR KAZAI believes there is a lot to be said for both.

In **Slovenia** it is the Supreme Court that gives cause for alarm. Displeased with a decision of the European Court of Human Rights, it announced by a simple press release and without any justification that it would only take note of judgments from Strasbourg as long as they are "persuasive". MATEJ AVBELJ reports.

All European threatening events of this week possibly pale in comparison to the threat the fifth-largest country of the world is facing at its presidential election this weekend: **Brazil**. DIEGO WERNECK ARGUELHES and THOMAZ PEREIRA describe in a two-part article what legal change the right-wing extremist Jair Bolsonaro should bring forth if he is elected, and what the prospects of the judiciary are to check his assaults.

Does the success of the autocrats in **Poland and Hungary** discredit the concept of constitutional pluralism? It depends, says MICHAL OVÁDEK, pointing out that overlapping constitutional orders are part of empirical reality in Europe.

India, the world's largest democracy, is at a crossroads, and the Supreme Court, according to TARUN KHAITAN's analysis, is pulling in one direction and the BJP majoritarian-nationalist government in the other.

In **Germany**, a major constitutional reform is taking place without anyone noticing. It's about federalism, as JOHANNES HELLERMANN explains, and will give the federal level more powers to foster investments at the states and municipalities level (German).

The **European** Court of Human Rights has issued a landmark ruling on the preventive detention of soccer hooligans, and THOMAS FELTES provides ten brief thoughts on the decision and its ramifications (German).

In **Cuba**, a constitutional reform is underway after the death of Fidel Castro. Although it remains a one-party state that imprisons opposition members and disallows free press, the concentration of power on the *máximo líder* will, according to HANS HOSTEN and CHRISTIAN KAUFHOLD, loosen a little.

In **Germany**, women can marry each other, but with respect to parenting equal treatment stops. LUCY CHEBOUT and ANNA THERESA RICHARZ call on the

legislator to recognize that mother, mother and child make a family as well as any other (German).

Elsewhere

JAN KEESEN and JACOB ULRICH report on the fundamental right on computer integrity, which is to decorate the state constitution of **Hesse** in the future as part of a so-called constitutional reform, which Hessians are called to vote parallel to the state elections on this Sunday, presented by thoroughly underwhelmed CARSTEN SCHÜTZ.

MARCO MEYER comes to the conclusion that the European Parliament was correct in handling abstentions at the vote on the Article 7 procedure against **Hungary** as not having been cast (all German).

THOMAS PERROUD criticises the impact of the case law of the **French** Constitutional Council, which restrains the legislator from enacting effective transparency rules for lobbyists (French).

RAFAEL BUSTOS GISBERT strongly advocates a fundamental reform of the Spanish Constitution (Spanish).

ROSALIND ENGLISH reports on the judgement of the European Court of Human Rights in the case of an **Austrian** woman who was criminally convicted for describing the Prophet Mohammed as a pedophile.

ALEXANDER HUDSON finds that the constitutional experiment in **Iceland** wrongly referred to as "crowdsourcing constitution" – long-time readers of Verfassungsblog may remember it – may be given another chance at last.

So long for this week. All the best, and take care,

Max Steinbeis

